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To: Subcommittee on Oversight, Ways & Means Committee

I am submitting this letter in my own capacity, in response to the call for comments in connection with the May 20 subcommittee hearing, “Examining the Use of Administrative Actions in the Implementation of the Affordable Care Act.” My scholarly research has revealed several circumstances where IRS regulations issued under Section 36B of the tax code plainly contradict the statute. I summarize these instances of IRS overreach below, so as to aid the Subcommittee’s understanding of administrative actions in the implementation of the Affordable Care Act.

1. *Extension of Credits to Persons Outside of Statutory Income Range.* Section 36B plainly provides premium tax credits to citizens only when their household incomes come with a specified income range (100 to 400 percent of the poverty line). IRS regulations disregard the statutory limitation and grant credits to potentially several million persons below the 100 percent statutory floor. The extension of this credit may trigger or increase penalties on employers.
2. *Extension of Credits to Some Low-Income Unlawful Aliens.* Section 36B allows aliens to enjoy premium tax credits even though they fall outside of the statutory range, when those aliens themselves lawfully reside in the United States. However, IRS regulations contradict the statute and allow unlawful aliens to receive premium tax credits in some circumstances.
3. *Extension of Credits to Persons Receiving Employer-Sponsored Minimum Essential Coverage.* Section 36B denies credits to persons who receive minimum essential coverage from their employers. However, IRS regulations allow for such persons to enjoy premium tax credits when those persons are automatically enrolled in employer coverage. This extension of the credit may increase penalties on employers.

The IRS’s amendments to Section 36B would likely be reasonable if it exercised legislative authority. However, the agency does not enjoy the power to re-write Section 36B to reflect the law that it thinks the Congress should have been enacted.

I have attached a draft article that more fully addresses Points 1 & 2 above. The article will be published soon with Bloomberg BNA. Point 3 is more fully addressed in a blog post at the *Yale Journal of Regulation* website and can be viewed here: <http://tinyurl.com/ACAautoenroll>.

I thank the Subcommittee for its consideration of these comments.

Sincerely,

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## DRAFT

Publication Forthcoming, *Bloomberg BNA* (May 2015)

### Lurking Challenges to the ACA Tax Credit Regulations

Andy S. Grewal\*

#### Introduction

By the end of its current term, the Supreme Court will decide *King v. Burwell* and address whether the Section 36B<sup>1</sup> premium tax credit extends to purchases of health care policies made on federally established exchanges.<sup>2</sup> The stakes of the litigation are high because only 14 states have set up their own health insurance exchanges, for which the availability of credits is not disputed.<sup>3</sup> If the challengers to the Treasury's regulation win,<sup>4</sup> millions of individuals will lose out on tax credits that they relied on when purchasing policies on federal exchanges. This could lead to a collapse<sup>5</sup> of the entire Patient Protection and Affordable Care Act (ACA),<sup>6</sup> popularly referred to as the ACA or Obamacare.

However, even if the government wins *King v. Burwell*, there remain potential challenges to the Treasury's rulemaking under Section 36B. A Treasury regulation that extends premium tax credits to individuals whose household incomes fall below the floor established by Section 36B(c)(1)(A) lacks statutory authority.<sup>7</sup> Another Treasury regulation that extends those credits to some unlawful aliens suffers from a similar infirmity.<sup>8</sup>

This article explains the legal problems with the Treasury's extension of premium tax credits to some low-income individuals and unlawful aliens. The goal here is not to attack the ACA, whose wisdom I am not qualified to pass on.<sup>9</sup> Nor do I wish to present some philosophical

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<sup>1</sup> Except when noted otherwise, Section references are to the Internal Revenue Code of 1986, as amended (26 U.S.C.).

<sup>2</sup> *King v. Burwell*, 759 F.3d 358 (4th Cir.), *cert. granted* 135 S. Ct. 475 (2014). Standing alone, § 36B(b)(2)(A) refers to credits only for persons "enrolled in through an Exchange established by the State," but the government argues that related statutory provisions support its view, reflected in regulations, that credits are available for purchases of policies on federal exchanges. See Treas. Reg. § 1.36B-2(a)(1) (providing tax credit eligibility to anyone "enrolled in one or more qualified health plans through an Exchange") and Treas. Reg. § 1.36B-1(k) (defining "Exchange" to include federally established exchanges).

<sup>3</sup> Kaiser Family Foundation, State Health Insurance Marketplace Types, 2015, <http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/> (last visited April 12, 2015) (describing marketplace attributes in each state).

<sup>4</sup> See generally Adler & Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 Health Matrix 119 (2013).

<sup>5</sup> Brief for Respondent at 11-13, 23-27, *King v. Burwell*, No. 14-114 (U.S. filed Oct. 2014) (describing in detail the implications of an adverse ruling). But see Joel M. Zinberg, "A *King v. Burwell* ruling for the plaintiffs may not equal death spirals," Inside Sources (Mar. 31, 2015).

<sup>6</sup> Pub. Law No. 111-148, 124 Stat. 119 (2010).

<sup>7</sup> See Treas. Reg. § 1.36B-2(b)(6), discussed *infra* Part II.

<sup>8</sup> See Treas. Reg. § 1.36B-2(b)(5), discussed *infra* Part III.

<sup>9</sup> Compare, e.g., Timothy Jost, *If The ACA Were Repealed, Just What Would Replace It?*, Health Affairs Blog (Apr. 14, 2015) (listing some achievements of the ACA and arguing that it "has been largely successful" in accomplishing stated goals), with Michael Cannon, *50 Vetoes: How States Can Stop the Obama Health Care Law*, Cato Institute White Paper (Mar. 21, 2013) ("President Obama's health care law remains harmful, unstable, and unpopular.").

objection to the extension of health care to our country's most impoverished individuals. (Who could be against such a thing?) Instead, I wish to use Section 36B to highlight the pitfalls associated with the Treasury's failure to recognize limits on its administrative authority.<sup>10</sup>

The ACA has become such a hot button issue that some will view any criticism as an inherently political attack. There is nothing that I can do about those with such a jaundiced view. But I hope that others will find that this article furthers their understanding of Section 36B and the administrative challenges related to making health care accessible to low-income individuals.

## I. "Applicable taxpayers" and Low-Income Individuals

Under Section 36B(a), an "applicable taxpayer" receives a tax credit determined by her premium assistance amount for a taxable year. The premium assistance amount generally depends on the premiums paid by the taxpayer for her and her dependents' health insurance coverage.<sup>11</sup> As household income rises, the taxpayer's credit generally shrinks.<sup>12</sup>

Section 36B(c)(1)(A) specifically defines "applicable taxpayer" and therefore the type of person eligible for the credit. The statute limits the term to "a taxpayer whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent of an amount equal to the poverty line for a family of the size involved." In other words, a taxpayer can enjoy a premium tax credit only if her household income hits a floor (100 percent of the relevant poverty line amount) but does not cross a ceiling (400 percent of that amount).<sup>13</sup>

Although it might seem odd to deny credits to taxpayers with the lowest levels of income, Congress contemplated that Medicaid would cover them. The ACA essentially commanded states to provide Medicaid coverage to individuals with income up to 133 percent of the relevant poverty line amount.<sup>14</sup> This reflected a significant expansion of prior law, under which some states offered Medicaid only to individuals whose income fell significantly below even the 100 percent amount.<sup>15</sup>

However, in *NFIB v. Sebelius*, the Supreme Court found that the severe consequences associated with a state's failure to expand Medicaid (loss of significant federal funding) reflected unconstitutional Congressional coercion.<sup>16</sup> Consequently, states can reject Medicaid expansion

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<sup>10</sup> See also, e.g., Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,381 (May 23, 2012) (acknowledging that § 36B(c)(2)(C)(iii) flatly denies premium tax credit for any month in which employee pays for and obtains minimum essential coverage under employer plan, even if such coverage is unaffordable or does not provide minimum value, but breaking from statute and proposed regulations to "clarify," in Treas. Reg. § 1.36B-2(c)(3)(vii)(B), that § 36B(c)(2)(C)(iii) does not apply in some circumstances where employee obtains coverage via automatic enrollment).

<sup>11</sup> See § 36B(b)(2).

<sup>12</sup> If § 36B(b)(2)(A)'s limitation does not apply, the premium tax credit will generally be determined by the cost of a silver plan over the applicable percentage of the taxpayer's household income, and the applicable percentage increases as household income rises. See §§ 36B(b)(2)(B) & (b)(3). A taxpayer's household income generally includes his modified adjusted gross income along with the aggregate modified adjusted gross incomes of the persons for whom he is allowed a deduction under § 151. For further relevant definitions, see § 36B(d).

<sup>13</sup> The poverty line amounts are determined by reference to Social Security law. See § 36B(d)(3)(A).

<sup>14</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012) (discussing Medicare expansion).

<sup>15</sup> See *id.* ("On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line.").

<sup>16</sup> *Id.* at 2604 (2012) ("[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head. § 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that 'further payments will not be made to the State.'").

without losing federal funding. Several million individuals now earn too much income to qualify under their state's non-expanded Medicaid program but earn too little to enjoy premium tax credits under Section 36B. These individuals fall within the so-called Medicaid coverage gap.<sup>17</sup>

## II. Regulatory Expansion of Section 36B(c)(1)(A)

Under Treas. Reg. § 1.36B-2(b)(6), an individual qualifies as an “applicable taxpayer” and can enjoy the premium tax credit even if his household income falls below the 100 percent statutory floor. This rule applies when the taxpayer or his family member enrolls in a plan on an exchange, the exchange estimates his household income falls with the 100-400 percent statutory range, advance credits are authorized and paid, and the taxpayer would qualify under the statute if the 100-400 percent limitation did not apply.<sup>18</sup> These taxpayers generally receive larger credits than do those who actually meet the statutory criteria.<sup>19</sup>

The regulation addresses an imperfection in the tax credit regime.<sup>20</sup> Under Section 36B, an applicable taxpayer's premium tax credit depends on her household income for a taxable year.<sup>21</sup> However, taxpayers generally purchase health insurance during open enrollment seasons, well in advance of the close of their taxable years. Consequently, taxpayers may enroll in health plans and receive advance payments of their premium tax credits without knowing whether they are in fact eligible for those credits.<sup>22</sup>

Under Section 36B(f), taxpayers generally must repay any excess credits that they received. But Treas. Reg. § 1.36B-2(b)(6) contradicts that rule. The regulation allows a taxpayer to fully keep her tax credits even if, at the close of the taxable year, the taxpayer's household income did not meet the statutory floor and the taxpayer was not entitled to any credits.<sup>23</sup>

As a matter of abstract policy, the Treasury regulation seems reasonable. But under the familiar *Chevron* framework, reasonableness depends on the agency's construction of the governing statute. And here, the statute leaves no room for interpretation: An applicable taxpayer includes only individuals whose income meets the 100 percent floor but does not cross the 400 percent ceiling. Wisely or not, “Congress has directly spoken to the precise question at

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<sup>17</sup> See Kaiser Family Foundation, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid* (2015) (noting that 22 states chose not to expand Medicaid and about 4 million poor uninsured adults fall into the Medicaid gap).

<sup>18</sup> See Treas. Reg. § 1.36B-2(b)(6)(i)-(iv).

<sup>19</sup> See Treas. Reg. § 1.36B-2(b)(7), under which the credit for beneficiaries of the special rule is computed by reference to taxpayer's actual household income rather than the 100 percent statutory floor, and § 36B(b)(2), under which lower levels of income generally increase the premium assistance credit amount, such that a person with (for example) household income at the 57 percent amount will receive a greater credit than someone at the 100 percent amount. Aside from household income, other factors influence the size of the credit, including the cost of the plan in a particular locality and the scope of desired coverage (e.g., coverage for spouse or dependents). However, in absolute dollar terms, and holding all else equal, Treas. Reg. § 1.36B-2(b)(7) effectively provides the largest tax credits to persons who do not satisfy the statutory criteria.

<sup>20</sup> See generally Lawrence Zelenak, *Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance Subsidies*, 65 Tax L. Rev. 723, 733-37 (2012) (questioning whether current year income reflects the proper standard for determining premium tax credit allowances).

<sup>21</sup> See § 36B(b).

<sup>22</sup> Taxpayers need not apply the full amount of their estimated credits to their monthly premiums.

<sup>23</sup> Taxpayers described in Treas. Reg. § 1.36B-2(b)(6) could even receive tax refunds if their premium assistance amounts exceeded their advance payments, which seems quite possible given the special rule in Treas. Reg. § 1.36B-2(b)(7).

issue,” and a “court, as well as the agency, must give effect to th[at] unambiguously expressed intent.”<sup>24</sup> Because Treas. Reg. § 1.36B-2(b)(6) contradicts the congressionally prescribed criteria, it reflects an impermissible interpretation of the statute.

The Treasury indirectly acknowledged this when it responded to public comments on the premium tax credit regulations. In its Notice of Proposed Rulemaking, the Treasury stated that Treas. Reg. § 1.36B-2(b)(6) would merely “clarify” that individuals outside of the statutory range could enjoy premium tax credits.<sup>25</sup> In response, commentators urged the Treasury to expand the regulation such that individuals whose actual household incomes exceeded the statutory range would also get to keep their credits, if those individuals received advance payments in circumstances similar to those described for low-income individuals.<sup>26</sup> However, the Treasury rejected those comments, concluding that they ran “contrary to the language of section 36B.”<sup>27</sup>

It’s hard to reconcile Treas. Reg. § 1.36B-2(b)(6) with the Treasury’s response to the commentators. The Treasury would not provide tax benefits to individuals whose incomes exceed the 400 percent ceiling because doing so runs contrary to the statute. Yet the Treasury maintains that individuals with household incomes below the 100 percent floor may qualify as applicable taxpayers. In other words, the Treasury thinks that it’s ambiguous whether a taxpayer at the 99 percent level comes within the 100-400 percent statutory range but that a taxpayer at the 401 percent level unambiguously exceeds it.

A court probably won’t have trouble seeing the similarity between the situations. Taxpayers outside of the statutory range, whether at the high end or the low end, do not qualify as applicable taxpayers and are not entitled to premium tax credits. Nothing in Section 36B allows the Treasury to rewrite the criteria for qualifying as an applicable taxpayer.

In arguing that the Treasury should indirectly expand the availability of premium tax credits, one group relied on Section 36B(g)(1).<sup>28</sup> That statute authorizes regulations providing for “the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412” of the ACA. But the group misunderstood the direction of the statutory scheme.

Section 36B(g)(1) does not contemplate that premium tax credits are available whenever a taxpayer gets an advance payment. Instead, it contemplates that advance payments will be made for credits that are “allowed under this section [36B].” The statute’s plain language reiterates that Section 36B governs credit determinations. If the fact of an advance payment fixed a taxpayer’s right to a tax credit, much of Section 36B would be pointless.<sup>29</sup> Section

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<sup>24</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

<sup>25</sup> Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) (“The proposed regulations clarify the treatment of a taxpayer who receives advance credit payments but has household income below 100 percent of the FPL for the taxable year.”).

<sup>26</sup> See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (“Commentators requested that the final regulations treat a taxpayer whose household income exceeds 400 percent of the FPL for the taxpayer’s family size as an applicable taxpayer if, at enrollment, the Exchange estimates that the taxpayer’s household income will be between 100 and 400 percent of the [poverty line] for the taxpayer’s family size and approves advance credit payments.”).

<sup>27</sup> See *id.* at 30,378.

<sup>28</sup> See AFL-CIO Criticizes Proposed Health Insurance Premium Tax Credit Regs, 2011 TNT 220-24 (arguing that § 36B(g)(1) allows for the Treasury to limit repayment obligations under § 36B(f) when a taxpayer’s circumstances change during the taxable year).

<sup>29</sup> See, e.g., § 36B(f)(1) (reducing allowable credit on account of advance payments); § 36B(f)(2)(A) (requiring repayment [i]f “the advance payments to a taxpayer under section 1412 of the Patient Protection and Affordable

36B(g)(1) does not authorize regulations allowing individuals to keep whatever advance payments they receive, and the Treasury properly rejected the group's comments.

Although this result may seem harsh, Section 36B(f) provides significant relief for poor individuals. If a taxpayer whose household income falls below the 200 percent poverty line amount receives advance payments that exceed the credit properly allowed, her repayment obligation will be limited to \$600.<sup>30</sup> One need not qualify as an applicable taxpayer to enjoy the benefits of this limitation, and a low-income individual will not face thousands of dollars of tax credit repayments.

Of course, repaying even \$600 may impose severe hardships on taxpayers with few dollars to spare. However, the Treasury regulation encourages behavior that may lead to bigger problems. Under the regulation, a taxpayer who believes that he will fall short of the floor may be encouraged by an unscrupulous tax advisor or enrollment counselor to engage in unethical behavior and inflate income, especially if she is caught by the Medicaid coverage gap.<sup>31</sup>

The ACA, however, contains extraordinary penalties for those who negligently or intentionally supply incorrect information to an exchange. Under Section 1411(h)(1) of the ACA, an individual who negligently provides incorrect information when enrolling on an exchange faces a \$25,000 penalty, and someone who intentionally provides incorrect information faces a \$250,000 penalty.<sup>32</sup> To the extent that the IRS actually enforces these crippling provisions, taxpayers encouraged by Treas. Reg. § 1.36B-2(b)(6) to inflate income may face problems much more severe than those associated with being caught in the Medicaid gap.

Also, unlike other regulations that provide benefits to taxpayers, Treas. Reg. § 1.36B-2(b)(6) could face judicial challenge. Sections 4980H(a) & (b) impose penalties on large employers who fail to offer health coverage or who fail to offer affordable minimum essential coverage.<sup>33</sup> Those penalties are triggered or increased when a full-time employee receives a Section 36B tax credit for her purchase of a health policy on an exchange.<sup>34</sup> Because the regulation expands the scope of applicable taxpayers and therefore the persons eligible for the credit,<sup>35</sup> it increases the number of individuals who might trigger the Section 4980H(a) penalty or increase the Section 4980H(b) penalty.<sup>36</sup> In appealing the assessment of any penalty,<sup>37</sup> an employer can argue that the regulation invalidly extended a credit to a full-time employee.

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Care Act for a taxable year exceed the credit allowed by this section"). The various provisions related to current year tax attributes would also be pointless, because exchange estimates depend on prior year attributes.

<sup>30</sup> See § 36B(f)(2)(B)(i) (prescribing a maximum \$600 tax liability increase for persons whose household income is less than 200 percent of the relevant poverty line).

<sup>31</sup> See also Jack L. Millman, *Gambling for Healthcare*, 76 Ohio St. L.J. (2015) (suggesting an "absurd tax planning" technique under which poor persons may use wagering activities to inflate household income and arguing that this "illustrate[s] the perversity of the current situation and the need for Congress or states to act").

<sup>32</sup> The reasonable cause defense applies to the negligence penalties. See ACA § 1411(h)(1)(A)(ii).

<sup>33</sup> See § 5000A(f) (defining minimum essential coverage).

<sup>34</sup> See §§ 4980H(a)(2) & (b)(1)(B). The receipt of a cost-sharing reduction under § 1402 of the ACA of the ACA may also trigger a penalty.

<sup>35</sup> The annual household income of most full-time employees probably exceeds the 100 percent poverty line amount, such that the regulation will not apply to them. However, a full-time employee's annual household income may fall below the poverty line amount if, for example, he has a large family or if he is employed for only a few months during the year.

<sup>36</sup> For employers who do not offer health coverage, the allowance or payment of a credit for a single full-time employee triggers a penalty based on the number of the employer's full-time employees. See § 4980H(a). For an employer who offers some type of health coverage, the penalty depends on the number of full-time employees who are actually allowed or paid credits. See § 4980H(b). If, for a given month, an individual can obtain affordable

### III. Regulatory Expansion of Section 36B(c)(1)(B)

Although Section 36B(c) generally denies applicable-taxpayer status to individuals below the 100 percent poverty line, the statute contains a special rule for some individuals lawfully present in the United States. Under Section 36B(c)(1)(B), a lawfully present alien with household income below the 100 percent amount who is ineligible for Medicaid by reason of her alien status will be treated as if her household income were equal to the 100 percent amount.<sup>38</sup> Unlike very low-income citizens, whom Congress thought would obtain Medicaid coverage, some low-income lawful aliens may enjoy premium tax credits under Section 36B.

Treasury regulations, however, expand the statute and provide tax credits to individuals not lawfully present. Under Treas. Reg. § 1.36B-2(b)(5), the special rule applies when “the taxpayer *or a member of the taxpayer’s family* is lawfully present in the United States,” and “the lawfully present taxpayer *or family member* is not eligible for the Medicaid program.” The italicized language, not found in the governing statute, allows the lawful status of a family member to qualify an unlawful alien as an applicable taxpayer.

The regulation’s preamble offers no explanation and cites no authority for going beyond the statutory language, but policy objections to Section 36B(c)(1)(D) might have prompted the Treasury to act. Under that statute, an individual for whom a section 151 deduction is allowable to another person cannot take the premium tax credit. Consequently, if a lawfully present alien obtains health coverage but is the dependent of an unlawful alien, the statute denies the availability of the credit. The regulation overrides the statutory limitation and effectively permits a credit in these circumstances.

Once again, the Treasury regulation seems reasonable as a matter of abstract policy. But Section 36B(c)(1)(B) does not present any interpretive gap for the Treasury to fill. In precise terms, Congress crafted a special rule that treats an alien whose household income falls outside of the statutory range as an applicable taxpayer only if the alien himself enjoys lawful status, and it specifically denied credits to dependents.

Nonetheless, it seems doubtful that a judicial challenge to Reg. 1.36B-2(b)(5) will arise. The Section 4980H penalty is triggered or increased when an employee obtains a tax credit for his own coverage on an exchange.<sup>39</sup> The regulation, however, extends credits to dependents of employees, not employees themselves. Consequently, it seems unlikely, though not impossible, that Reg. 1.36B-2(b)(5) will lead to further employer penalties.<sup>40</sup>

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minimum essential coverage through her employer, she will not be eligible for a § 36B credit for that month. *See* §§ 36B(c)(2)(A)-(C).

<sup>37</sup> *See* § 1411(f)(2)(A) of the ACA (directing the HHS to establish a “separate appeals process for employers who are notified . . . that the employer may be liable for a tax imposed by section 4980H of the Internal Revenue Code of 1986 with respect to an employee”). HHS procedures are in addition to the appeal rights generally found in the tax code. *See id.*

<sup>38</sup> Under many Medicaid programs, aliens become eligible for benefits only after the expiration of a 5-year waiting period. *See generally* Karla Guerrero, *Waiting Five Years for Healthcare: How Restricting Immigrants’ Access to Medicaid Harms All*, 21 *Annals Health Law Advance Directive* 109 (2011); Vinita Andrapalliyal, “*Healthcare for All*”? *The Gap Between Rhetoric and Reality in the Affordable Care Act*, 61 *UCLA L. Rev. Discourse* 58 (2013).

<sup>39</sup> *See* Shared Responsibility for Employers Regarding Health Coverage, 79 *Fed. Reg.* 8,544, 8,544 (Feb. 12, 2014) (“[C]overage for a dependent only will not result in liability for the employer under section 4980H.”).

<sup>40</sup> The regulation might lead to an employer penalty in some highly convoluted circumstances, such as where the unlawful alien and the dependent lawful alien are both full-time employees of the same employer and other

Any blowback to the Treasury for contradicting the statute will likely be political. Literally speaking, the regulation allows unlawful aliens to obtain tax credits, and issues related to unlawful aliens reflected a controversial issue during debates over the ACA. The statute itself allows unlawful aliens to take credits on behalf of lawful family members when household income falls within the 100-400 percent statutory range,<sup>41</sup> but a further extension of credits without statutory authority could raise the ire of some lawmakers.

## Conclusion

As the Treasury and other agencies issue guidance under the ACA, more and more problems in the statute come to light. Current regulations reflect a desire to implement the ACA as the Treasury thought it should have been drafted, rather than as it was drafted. In the long run, it's doubtful that a complex statute can offer stability if agency guidance contradicts fundamental provisions, especially given the shifting priorities and viewpoints of different administrations.

Administrative regulations that lack statutory foundation also jeopardize those who rely on them. Ordinarily, no one enjoys standing to challenge beneficial tax regulations.<sup>42</sup> But the ACA's structure pits taxpayers against each other, where a credit to one class of persons triggers or increases penalties on another class.

Going forward, the Treasury should re-consider its unilateral approach to the ACA. The current legislative majority might not seem amenable to the amendments that the Treasury has effected by regulation, but no canon of statutory construction expands an agency's authority upon a showing that it is acting against the will of Congress. To amend Section 36B and provide health care to our society's most vulnerable individuals, the Treasury should do everything possible to reach a compromise with our elected representatives.<sup>43</sup>

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requirements are met.

<sup>41</sup> § 36B(a) does not carve unlawful aliens from its general rule. However, such persons cannot legally obtain coverage for themselves on an exchange. *See* Treas. Reg. § 1.36B-2(b)(4).

<sup>42</sup> Somewhat perversely, invalid regulations that provide benefits to low-income persons may give rise to challenges, but taxpayers will lack standing to challenge invalid regulations that provide benefits to large employers. *See, e.g.*, Treas. Reg. § 54.4980H-5(e)(2) (although § 4980H(b) imposes a penalty for failure to offer affordable minimum essential coverage, and receipt of premium tax credit by an employee increases the penalty, an employer that provides unaffordable coverage will be exempt from penalty under various nonstatutory safe harbors).

<sup>43</sup> *See* Jonathan Adler, *How the IRS repeatedly rewrites Obamacare tax credit provisions*, Wash. Post Volokh Conspiracy Blog (Apr. 14, 2015) ("Congress has already made over one dozen changes to the PPACA that have been signed into law, and there is no reason it could not make others."); Zelenak, *supra* note 20 at 727 (noting that Congress has twice amended I.R.C. § 36B(f) advance payment reconciliation rules).